Supreme Court No. 78667-4
Court of Appeals Div. II No. 32946-8

SUPREME COURT OF THE
STATE OF WASHINGTON

FINANCIAL INDEMNITY COMPANY

Petitioner,

v.

KEVIN SHERRY

Respondent.

DEFENDANT/RESPONDENT'S REPLY TO AMICUS CURIAE BRIEF OF WASHINGTON STATE TRIAL LAWYER ASSOCATION

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I. FACTS

On April 4, 2001, Kevin Sherry was insured through a Financial Indemnity Company ("FIC") automobile insurance. On that date, Kevin Sherry was injured as a pedestrian in an automobile accident with an uninsured motorist. As a result of the accident, Kevin Sherry incurred $53,127.92 in medical expenses. FIC paid $10,000.00 in medical expenses and $4,600.00 in wage loss under the personal injury protection portion of the insurance policy. FIC declined to pay any money to Kevin Sherry under the UIM portion of the policy, and an arbitration was held pursuant to the terms of the UIM portion of the policy.

The arbitrator found Kevin Sherry had incurred medical special damages of $53,127.92 and general damages of $90,000.00. The arbitration award was confirmed by the superior court. The parties stipulated that the court could decide the issue of reimbursement of the payments made under the PIP portion of the policy, and the court decided that the entirety of the PIP payments should be reimbursed to FIC, less a proportionate share of fees and costs.

Kevin Sherry appealed. The Washington State Court of Appeals, Division II, reversed the superior court and

decided that Kevin Sherry had not been fully compensated, and that, as a result, under the holding in Thiringer v. American Motors Ins. Co., 91 Wn.2d 215, 588 P.2d 191 (1978), Kevin Sherry had not been fully compensated, and therefore FIC was not entitled to reimbursement of the payments made under PIP.

FIC petitioned for and was granted review.

WASHINGTON STATE TRIAL LAWYERS ASSOCIATION FOUNDATION ("Amicus") petitioned for and was granted the opportunity to file an amicus curiae brief. Sherry responds.

II. ISSUES

1. Can parties stipulate to the jurisdiction of the superior court?

2. When is a partially at-fault insured who has both PIP and UIM coverage fully compensated?

III. Brief Answers

1. Parties can stipulate to the jurisdiction of the Superior Court, where the Superior Court has jurisdiction to decide an issue, and the application of that decision is not contrary to law.

2. An accident victim must be fully compensated before he is obligated to repay payments made on his behalf by his PIP carrier.

IV. ARGUMENT/AUTHORITY

A. The Superior Court May Decide Issues Incident To A Confirmation Hearing Where The Parties Agree.

The jurisdiction of the superior court is limited by the nature of the special statutory proceeding to resolve only those questions properly submitted to the arbitrators and costs; so as to reduce to judgment

only such matters properly submitted to arbitration and as the parties may otherwise agree.

Price v. Farmers Ins. Co., 133 Wn.2d 490, 498, 946 P.2d 388 (1997).

Amicus contends that the court had the authority to determine the issue incident to the confirmation of the arbitration award with limitations. This court has made it clear in both Price v. Farmers and Dayton v. Farmers that a superior court confirmation hearing under RCW 7.04 is limited to the face of the award. Although they probably have more similarities than differences to this case, both Price and Farmers can be distinguished. In both cases, the parties did not agree to jurisdiction, and in fact, one party specifically objected to the superior court going behind the award to decide ancillary issues. Price at 496-497. Dayton v. Farmers Insurance Group 14 Wn. 2d 277,280, 876 P. 2d 896 (1994). In this case, the parties agreed. In Price, this court held that the superior court was bound to enter judgment on those items submitted to arbitration "and as the parties may otherwise agree."

This court has indicated previously that "parties cannot stipulate to jurisdiction, or create their own boundaries for review." See Godfrey v. Hartford Cas. Ins. Co., 142 Wn.2d 885, 897, 16 P.3d 617 (2001) citing *Barnett v. Hicks*, 119 Wash.2d 151, 829 P.2d 1087 (1992).

In Godfrey, the parties sought to eviscerate the arbitration act by including a provision for "trial de novo" in the policy that was not included in the act. Godfrey at 896. In Barnett, the parties asked the court to go behind the award to determine facts that had been submitted to the arbitrator. Barnett at 157.

Neither case applies here. The issue of offset was not, and could not properly have been decided by the arbitrator in this case. A "de novo" review was not requested of the arbitrator's decision, the court was instead asked to determine offset by agreement of the parties. The court was not asked to go beyond the arbitration award, but instead was asked to decide a separate, ancillary issue that had not been decided by the arbitrator. Had either party objected, the court could not have decided the issue, pursuant to RCW 7.04 and the holdings in Price and Farmers. Morevoer, the superior court does have jurisdiction under the Declaratory Relief act to decide "rights" between the parties. RCW 7.24. The parties could have left the matter for a separate declaratory relief action, and if either had objected, the holding in Price would have compelled a separate action. With the agreement of the parties, the court properly decided the offset issue in this case.

B. A Party Must Be Fully Compensated Before He Is Required To Reimburse His PIP Carrier.

> "Compensatory damages are such as will compensate the injured party for the injury sustained, and nothing more . . ." Black's Law Dictionary, Fifth Edition.
>
> The general rule is that, while an insurer is entitled to be reimbursed to the extent that its insured recovers payment for the same loss from a tortfeasor responsible for the damage, it can recover only the excess which the insured has received from the wrongdoer, remaining after the insured is fully compensated for his loss.

Thiringer at 219 (citations omitted).

Kevin Sherry's compensatory damages totaled $143,127.92. After reduction for comparative fault, he was entitled to recover a total of $42,938.38 from the tortfeasor. Simplistically, Kevin Sherry was not fully compensated for his loss by the arbitration award in this matter. Under Thiringer, FIC is not entitled to recover its PIP payments.

Even with that simplistic analysis, there is still a question of what "full compensation" means, however. Thiringer sets out the public policy of "the adequate indemnification of innocent automobile accident victims" Thiringer at 220. Thiringer also confirms that adequate indemnification does not mean "double recovery". See Thiringer at 219.

Both FIC and Amicus have focused on the word "innocent". The word innocent is meaningless for the purposes of negligence or liability. The word innocent is not used in any discussion of fault or liability in RCW 4.22. Black's defines innocent as "free from guilt, acting in good faith and without knowledge of incriminatory circumstances, or of defects or objections." The term should not have any effect on the analysis of full compensation. If we accept FIC's argument, an individual who was 5% at fault would not be "innocent" and would therefore be required to reimburse the full amount of PIP payments made, regardless of her recovery.

"PIP policies provide a contractual (no-fault) right of action against one's own insurer for medical expenses (and certain other losses) arising from motor vehicle accidents." Wood v. Mutual of Enumclaw, 97 Wash. App. 721, 726, 986 P.2d 833 (1999) citing RCW 48.22.085, .090. It is certainly a reasonable expectation for an insured that PIP payments would be made whether he was completely at fault for an accident, partially at fault for an accident, or not at fault at all. In its policy, FIC promised to make PIP payments regardless of fault: FIC then relies on fault to attempt to recover its payments. In a case such as Kevin Sherry's, where he suffered more than $53,000.00 in medical

special damages and general damages of $90,000.00, and where the net amount of the arbitration award was $42,938.38, the accident victim was not fully compensated.

DATED this 15th day of March, 2007

DAVID H. MIDDLETON
& ASSOCIATES, P.S.

David H. Middleton, #22485
Attorney for Kevin Sherry

FILED AS ATTACHMENT
TO E-MAIL

DECLARATION OF SERVICE

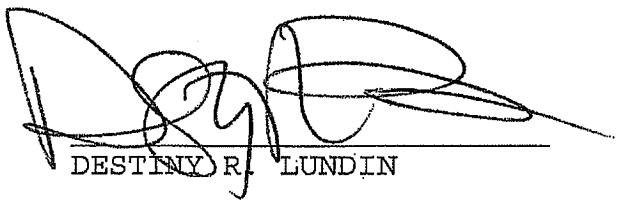
I, Destiny R. Lundin, state:

On this 15th day March, I caused to be mailed by first class postage to Debora A. Dunlap, 325 118th Ave SE Ste 209, Bellevue WA 98005, attorney for Petitioner, and by facsimile, a copy of the following document:

DEFENDANT/RESPONDENT'S REPLY TO AMICUS CURIAE BRIEF OF WASHINGTON STATE TRIAL LAWYER ASSOCATION

Declarant is a resident of the State of Washington and over the age of eighteen (18) years. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 15th day of March, 2007, at Federal Way, Washington.



DESTINY R. LUNDIN

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